

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

BEFORE THE SOUTH CAROLINA
PROCUREMENT REVIEW PANEL
Case No. 1990-16

IN RE:)

PROTEST OF OLSTEN SERVICES)

O R D E R

This case came before the South Carolina Procurement Review Panel for hearing on November 19, 1990, on the appeal by Olsten Services ("Olsten") of a decision by the Chief Procurement Officer ("CPO") dismissing Olsten's protest for lack of timeliness.

Present at the hearing were Olsten, represented by Scott R. Elliott, Esq., and the Division of General Services, represented by Helen Zeigler, Esquire.

FINDING OF FACTS

On July 6, 1990, State Procurement issued an Invitation for Bids ("IFB") to provide temporary employment services to state agencies for the 1990-91 contract year. Olsten was the holder of the 1989-90 contract for the Columbia area.

In mid-June, Barbara Taylor, Area Manager for Olsten, became concerned because Olsten had not received any information on bidding on the 1990 contract. She contacted State Procurement and spoke with Procurement Officer Joe Fraley and was informed that the Invitation for Bids would be forthcoming. Two weeks later, Ms. Taylor again called Mr. Fraley and was advised that the IFB was in the mail.

On July 18, an advertisement about the IFB appeared in South Carolina Business Opportunities. (Record, p. 52). On

July 30, 1990, the IFB was opened and bids from 14 vendors were publicly announced.

State Procurement never sent Olsten a copy of the IFB in this case. Olsten had not registered with State Procurement to be put on the bidder's list because Olsten was the incumbent vendor and had received copies of the IFB on previous contracts. In this case, State Procurement made a mistake and failed to send several incumbent bidders a copy of the IFB. State Procurement in the past had made a practice of sending incumbents on this contract complimentary copies of the IFB.

On July 31, Olsten learned from another vendor that bids were opened on July 30. Olsten called Mr. Fraley's supervisor at State Procurement, Dixie Jacobs, and learned that Mr. Fraley had made a mistake and that State Procurement had not sent Olsten a copy of the IFB.

Ms. Taylor also talked and met with Virgil Carlsen, Ms. Jacob's supervisor, about reopening bids. At an August 17 meeting, Mr. Carlsen mentioned to Ms. Taylor that Olsten had the right to file a protest under the Procurement Code. Ms. Taylor testified that, up until the August 17 meeting, she believed that Olsten had a chance to get the contract rebid.

On August 20, 1990, Olsten submitted a letter of protest alleging that Olsten should have been sent a copy of the IFB. (Record, p. 16). The CPO found that Olsten's protest was untimely because Olsten knew on July 31 that the bids had been opened and that it did not receive a copy of

the IFB, yet did not file its protest until August 20, or twenty-one days later.

Olsten appeals the decision of the CPO to the Panel, alleging that:

(1) Olsten was timely.

(2) State Procurement had a duty to inform Olsten of the ten-day limit for filing protests.

(3) State Procurement should have informed Olsten of the IFB and the deadline for submitting bids and the failure to do so was willful, wanton and grossly reckless.

(4) State Procurement had a duty to notify Olsten of the IFB because of its past pattern and practice.

(5) State Procurement had a duty to inform Olsten of the IFB because its agents and employees told Olsten that it would.

Olsten asks that the contract be given to Olsten at the same price as the low bid, or that the contract be rebid, or the State continue to use those employees of Olsten that are currently being used, at the rate offered by the low bidder. Olsten also asks for its costs and attorney's fees.

CONCLUSIONS OF LAW

Section 11-35-4210(1) of the Consolidated Procurement Code provides:

(1) Right to Protest. Any actual or prospective bidder, offeror, contractor, or subcontractor who is aggrieved in connection with the solicitation or award of a contract may protest to the appropriate chief procurement officer. The protest, setting forth the grievance, shall be submitted in writing within ten days after such aggrieved

persons know or should have known of facts giving rise thereto, but in no circumstance after thirty days of notification of award of contract.

In this case, it is undisputed that Olsten knew on July 31 that bids had been opened for the temporary services contract and that Olsten had not been sent a copy of the IFB because of an error by State Procurement. It is also undisputed that Olsten did not file a protest in writing with the CPO until August 21, twenty-one days later.

Olsten argues that Ms. Taylor's phone conversations and meetings with State Procurement, during which she tried to get the State to rebid the contract, tolled the time limit - in other words, that Olsten's right to protest did not gel until Olsten decided that its informal efforts to get the contract rebid were not going to work. As support for its argument, Olsten points to §11-35-4210(2), which gives the chief procurement officer or his designee the authority to settle and resolve a protest prior to commencing an administrative review.

Olsten also contends that State Procurement should have told Ms. Taylor when she called and complained on July 31 that Olsten had the right to protest under the law and that its failure to do so excuses Olsten from meeting the ten-day limit.

Based on its interpretation of §11-35-4210(1) in previous decisions, the Panel is compelled to conclude that Olsten did not file its protest in a timely manner in this case.

In In re: Protest of Oakland Janitorial Service, Case No. 1988-13, Decisions of the South Carolina Procurement Review Panel 1982-1988, Page 533, the Panel held that the ten-day limit is jurisdictional and cannot be waived by the conduct of the State or other parties. In Oakland, the protestant claimed that State Procurement had misled it regarding the amount of time it had to file a protest. Quoting Freeman v. Fisher, 341 S.E.2d 136 (1986), the Panel noted that, "A party cannot claim reasonable reliance on a representation by another in the face of a clear statutory mandate." The Panel also cited Lovell v. C.A. Timbes, Inc., 210 S.E.2d 610 (1974), for the proposition that ignorance of a requirement for filing within a certain time is no legal excuse for failure to file within the time required.

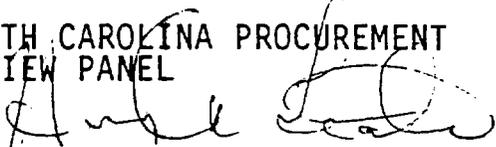
Because the right to protest and the mandatory time limits are set forth plainly in §11-35-4210(1) for anyone who chooses to read it, protestants are charged with knowing the law, regardless of whether State Procurement advises them of it correctly, or at all.

As for the argument that Olsten's rights did not begin to run until its informal efforts to resolve the matter failed, the Panel notes that paragraph (2) of §11-35-4210 only gives the CPO or his designee the right to resolve "protests" prior to beginning formal administrative review. Until Olsten set forth its grievance in writing and filed it with the CPO, as required by §11-35-4210(1), no "protest" existed.

Further, §11-35-4210(1) provides that protests must be filed within ten days of a protestant's gaining knowledge of the facts giving rise to the protest. The statute does not give protestants the luxury of pursuing informal remedies and any potential protestant that does so, does so at its own risk.¹

For the reasons set forth above, the Panel affirms the September 24, 1990, decision of the Chief Procurement Officer and dismisses the protest of Olsten Services.

SOUTH CAROLINA PROCUREMENT
REVIEW PANEL

By: 
Hugh K. Leatherman, Sr.

Columbia, S.C.
12-13-90, 1990

¹See Oakland Janitorial Services, cited above, at pages 540 - 541. ("The Panel believes that, in approving section 11-35-4210 as written, the General Assembly recognized that, despite the hardship which might occasionally arise from strict application of the time period, on balance the public is better served if there are definite limits to the right to challenge state procurement decisions.").